Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORMAN W. JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether the court-martial lacked jurisdiction to try the petitioner where the convening orders were signed by an officer without authority to authenticate general court-martial convening orders or to excuse court-members, and no evidence exists to establish that the substitution of one court-member was the personal decision of the convening authority.

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

The petitioner, Norman W. Johnson, Jr., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on July 22, 1994.

OPINIONS BELOW

The unpublished opinion of the United States Air Force Court of Military Review affirming petitioner's conviction, *United States v. Johnson,* ACM 29744, unpub. (A.F.C.M.R. 29 October 1994), is located at Appendix A. *See,* Article 66, U.C.M.J.; 10 U.S.C. § 866. The order and judgment of the United States Court of Military Appeals, USCMA Dkt No. 29744, dated 22 July 1994 is located at Appendix B. *See,* Article 67, U.C.M.J.; 10 U.S.C. § 867.

JURISDICTION

The final order of the United States Court of Military Appeal was entered on July 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

STATUTORY PROVISIONS INVOLVED

Article 22, U.C.M.J.; 10 U.S.C. § 822, provides in relevant part:

> (a) General courts-martial may be convened by –
>
> (7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps.

Article 25, U.C.M.J.; 10 U.S.C. § 825, provides in relevant part:

> (d)(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament . . .
>
> (e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

STATEMENT OF THE CASE

On 15, 16, and 17 January 1992, Airman Norman W. Johnson, Jr. (hereinafter referred to as "petitioner"), was tried by a general court-martial consisting of officer members. He pleaded guilty to three specifications each of sodomy and attempted sodomy, on diverse occasions between 1 March 1991 and 30 September 1991, with male children under 16 years of age; five specifications of committing indecent acts on diverse occasions between 1 March 1991 and 30 September 1991, upon male children under 16 years of age, and three specifications of taking indecent liberties, on diverse occasions between 1 March 1991 and 30 September 1991, with male children under 16 years of age; in violation of Articles 125, 80 and 134, U.C.M.J., 10 United States Code Sections 925, 880, and 934 (1988). He was sentenced to a dishonorable discharge, confinement at hard labor for seventy years, forfeitures of all pay and allowances, and reduction in rank to the grade of E-1. In compliance with a pretrial agreement, the convening authority reduced the confinement portion of the sentence to thirty years, but otherwise approved the sentence. The Air Force Court of Military Review upheld the findings and sentence. Appellant filed a timely Petition for Grant of Review. The United States granted the Appellant's petition for grant of review, and summarily affirmed.

The record of trial reflects that appellant's court-martial was convened on the basis of two special orders, each of which was signed by a Major Glenn K. Richardson. Major Richardson is designated on the convening orders as an "assistant staff judge advocate." (Special Order AB-10, dated 30 November 1991; and Special Order AB-12, dated 3 January 1992).

Documents obtained from the government pertaining to the said special orders were submitted to the United States Court of Military Appeals upon a granted motion. The

motion and documents are located at Appendix C. These documents reflect that on 30 November 1991, the convening authority, Lieutenant General Robert D. Beckel, appears to have personally selected nine court members to serve on appellant's court-martial.[1] Those same nine officers were listed as court members on Special Order AB-10, dated 30 November 1991. Special Order AB-10, signed by Major Glenn Richardson, assistant staff judge advocate, bears the unsigned signature block of Lieutenant General Beckel.

Shortly before appellant's trial, Special Order AB-12, dated 3 January 1992, modified Lieutenant General Beckel's personal selection of the nine court members. Special Order AB-12 removed from appellant's court-martial one court member (Colonel Everett G. Beckwith) selected by Lieutenant General Beckel, and substituted in his stead another officer (LTC James G. Hicks). The record nowhere reflects that Lieutenant General Beckel personally selected LTC James G. Hicks to sit as a member of appellant's court-martial, or that Lieutenant General Beckel relieved Colonel Beckwith. Furthermore, Lieutenant General Beckel's signature does not appear on either Special Order AB-10 or AB-12. To date the government has not produced any document purporting to authorize Major Richardson to either execute or authenticate Special Orders AB-10 and AB-12.

REASONS FOR GRANTING WRIT

1. *Major Glenn Richardson, an assistant staff judge advocate, lacked authority to either execute or authenticate Special Order AB-10 and Special Order AB-12.*

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[1] This is indicated by check marks being placed beside the names of nine out of the fifteen officers listed.

There are no standing courts in the military justice system. Instead, each court is created, or "convened" by a person statutorily empowered to do so. The President, Secretary of Defense, the service Secretary, and certain military commanders are authorized to create courts designated as general courts-martials. *See* Article 22, U.C.M.J.; 10 U.S.C. § 822. A court-martial created under the auspices of command can only be convened by *the* commanding officer, and the power may not be delegated. *United States v. Caputo,* 18 M.J. 259, 260 n. 1 (C.M.A. 1984); *United States v. Kalscheuer,* 11 M.J. 373, 376 (C.M.A. 1981).

In addition to creating the court, the convening authority also selects the members who will serve on that court. The power to select the members is personal and non-delegable. Article 25(d)(2), U.C.M.J.; 10 U.S.C. § 825(d)(2); *United States v. McCall,* 26 M.J. 804, 805 (A.C.M.R. 1988); *United States v. Allgood,* 37 M.J. 960 (1993). The responsibilities of court members "are analogous to, but somewhat greater than, those of civilian jurors." *Weiss v. United States,* 114 S.Ct. 752, 755, n.1 (1994). While a convening authority must personally *select* the members, the power to *excuse* members may be delegated.

> Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority *under this subsection* to his staff judge advocate or legal officer or to any other principal assistant.

Article 25(e), U.C.M.J.; 10 U.S.C. § 825(e) (emphasis added).

Major Richardson was obviously not a commander, for he did not have that rank or position, and therefore did not have authority to select members of the petitioner's court. Furthermore, Air Force regulations provide no authority for the convening authority to delegate authority to an *assistant* staff judge advocate, such as Major Richardson, to sign or authenticate convening orders as a matter of delegated, ministerial authority.

To the contrary, Air Force regulations appear to limit delegated authority to the Staff Judge Advocate level. In particular, Air Force Regulation 10-7, paragraph 1-8(b)(2)[2], discusses the proper numbering of special orders, and therein refers to "when a headquarters authorizes *the Staff Judge Advocate* to authenticate orders." (Emphasis added). Nowhere is it mentioned in the regulation that an *assistant* staff judge advocate may be delegated the duty of signing convening orders on behalf of the convening authority.

Such a limitation on the level of delegation is consistent with the role of the Staff Judge Advocate: the Staff Judge Advocate is required to take an impartial role in military pretrial proceedings; and case law makes clear that there are other instances in which the Staff Judge Advocate, and he or she alone, is required to sign official documents (e.g., the pretrial advice, "The pretrial advice *must* be signed by the Staff Judge Advocate or the acting Staff Judge Advocate, and that officer bears personal responsibility for the accuracy of its contents," (emphasis in original); *United States v. Hayes,* 24 M.J. 786, 788 (A.C.M.R. 1987), *rev. den.* 25 M.J. 383 (C.M.A. 1987).

The military courts have long recognized that a court-martial is a creature of the order promulgated by an authorized commander. Thus, since without such an order

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[2] Attached to Appendix C.

there is no court, a fundamental defect in the order negates the very document itself and no court exists. *United States v. Ryan,* 5 M.J. 97 (C.M.A. 1978). Here, more than a simple administrative error is at issue. In this regard, *United States v. Gebhart,* 34 M.J. 189 (C.M.A. 1992) is distinguishable. In the case *sub judice,* unlike in *Gebhart,* the person who signed the convening orders did not have the authority to do so. Given that Major Richardson, an assistant staff judge advocate, had no authority to authenticate convening orders, as a legal matter, there were no convening orders in this case. Both Special Order AB-10 and Special Order AB-12 are legal nullities, and cannot be relied upon as the basis for convening the appellant's court-martial.

Further, it appears that Major Richardson appointed the court member reflected on Special Order AB-12, and excused the court-member who is "viced" on that order. The fact that the unsigned signature block of the convening authority appears thereon does not salvage this order; there is nothing to reflect that Lieutenant General Beckel personally selected the substituted court member. The fact that an assistant staff judge advocate signed the convening orders is suspect, and leads to the inference that he is the officer who selected the court member.

The situation in the instant case is similar to that in *United States v. McCall*:

> The documentary evidence supports this offer of proof: their names [the members whose names appear on the vicing order] were not marked on the nominating lists as were the other members selected by the convening authority. This evidence can only warrant a finding that someone had exercised unacceptable liberties with the undelegable statutory responsibility of the convening authority.

Thus, given the state of the documentary evidence, there is jurisdictional error in this case.

2. *The presumption of administrative regularity is inapplicable to this case.*

At times the military courts have relied upon a presumption of regularity to save apparent defects in the proceedings below. However, there can be no reliance upon a presumption of regularity in determining whether a court-martial has been properly vested with jurisdiction. *United States v. Emerson,* 12 M.J. 512 (N.M.C.M.R. 1981), citing *United States v. Bancroft,* 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953). In fact, no presumption in favor of a court-martial's exercise of jurisdiction is permissible. *Id.*

Here, the convening orders reflect that the person who modified Lieutenant General Beckel's order was Major Glen K. Richardson, an assistant staff judge advocate; Major Richardson, as pointed out above, lacked the power and authority to convene appellant's general court-martial, to select a court-martial member (LTC Hicks), to excuse from service at appellant's trial a court-member expressly selected by Lieutenant General Beckel (Colonel Beckwith), and to authenticate any convening order issued by Lieutenant General Beckel.

In *United States v. Singleton,* 21 U.S.C.M.A. 431, 45 C.M.R. 205 (1972), the record of trial reflected that there had been an oral appointment of the military judge, defense counsel and trial counsel by the convening authority. Nonetheless, the Court held at page 433:

> We are constrained, however, to hold, that this record is silent with regard to the contents of the oral appointment, when it was made or by whom. In sum, it is impossible to determine that the convening authority or one acting as such in his absence, made

> the appropriate appointments as he is required to do so by both the Code and the Manual.

Id., 45 C.M.R. at 208. *See also United States v. Carey*, 23 U.S.C.M.A. 315, 49 C.M.R. 605 (1975) and *United States v. Ryan, supra.*

Furthermore, the absence of paperwork in this case cannot be cured by a presumption of administrative regularity because the absence of documentation destroys any presumption of regularity to which the government otherwise might be entitled. *United States v. Hayes, supra,* 24 M.J. at 788.

Because there is no basis in the record to determine whether the court-martial was lawfully convened, the Court of Military Appeals should have disapproved the findings and sentence, and returned the case to the convening authority to properly convene a court, or otherwise dispose of the case as appropriate.

CONCLUSION

Congress has vested the authority to convene general courts-martial in certain senior officers who, as a result of their leadership positions, are entrusted with the heavy responsibility of ensuring the integrity and fairness of the military justice system. In this case, the decision to convene the court, as reflected in the special orders, was authenticated by an officer ineligible to do so. Further, it appears the same junior officer, Major Richardson, without authority to do so, excused one court member and detailed another. Such actions not only frustrate the intent of Congress, they divested the court of jurisdiction to try the petitioner. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1994

APPENDICES

APPENDIX A

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29744

UNITED STATES

v.

AIRMAN NORMAN W. JOHNSON, JR., FR229-23-2740
UNITED STATES AIR FORCE

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29 October 1993

Sentence adjudged 17 January 1992 by GCM convened at March Air Force Base, California. Military Judge: William C. Thompson, Jr.

Approved sentence: Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Terry J. Woodhouse, Major Alice M. Kottmyer, Major Mary C. Yastishock, and Major Marc A. Fox.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffrey T. Infelise, and Captain David C. Wesley.

Before

SNYDER, RAICHLE, and JAMES
Appellate Military Judges

OPINION OF THE COURT

SNYDER, Senior Judge:

Pursuant to his negotiated pleas, Airman Johnson was convicted, by general court-martial, of three specifications each of sodomy and attempted sodomy, on divers occasions, with male children under 16 years of age, five specifications of committing indecent acts on divers occasions upon male children under 16 years of age, and three specifications of taking indecent liberties, on divers occasions, with male children under 16 years of age, in violation of Articles 125, 80, and 134 UCMJ, 10 U.S.C. §§ 925, 880, 934 (1988). He was sentenced to a dishonorable discharge, confinement for 70 years, forfeiture of all pay and allowances, and reduction to E-1. To comply with the pretrial agreement, the convening authority reduced the confinement portion of the sentence to 30 years, but otherwise approved the sentence. Finding no merit in appellant's six assignments of error, we affirm.

I

Appellant avers the military judge abused his discretion by denying his challenge for cause of Colonel B. We disagree. Appellant asserts that Colonel B's answers on *voir dire* regarding his religious beliefs and views on homosexuality demonstrated an inelastic attitude towards sentencing. In the alternative, appellant avers Colonel B should have been removed in the interest of having the trial appear free from substantial doubt as to legality, fairness, and impartiality. *See* R.C.M. 912(f)(1)(N).

After reading a copy of the charges and specifications, to which appellant had pleaded guilty, and in response to defense counsel's questions of the panel as a whole, Colonel B candidly stated the charges invoked anger. Later

during individual *voir dire,* part of the colloquy went as follows:

DC: I misunderstood your response, sir. Are you still in that phase of "Oh, my God?"

MBR: Yes. I still find [the offenses] offensive.

DC: Offensive. Can you be a little bit more detailed? What do you mean by offensive? What are your real gut feelings right now as you sit there?

MBR: I would say probably anger would be the closest.

DC: Anger. So, from the time that I asked that question to almost five minutes later, you're still at the anger stage? Is that right?

MBR: Yes.

DC: In response to Major [B's] question, you said that you thought you could be impartial?

MBR: Yes.

DC: Why do you feel that way?

MBR: Because as far as sentencing would be to see what has actually occurred and to determine what should be done.

A court member who harbors an inelastic attitude or bias towards a certain offense, or a particular type punishment for an offense is not qualified to sit as a member of a court-martial. R.C.M. 912(f)(1)(N); *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985). On the other hand, "[a] member is not automatically disqualified, however, if he is candid enough to admit to an unfavorable inclination toward a particular offense." *United States v. Reynolds,* 23 M.J. 292, 294 (C.M.A. 1987). The test we apply is whether any bias evidenced by a member is such that "it will not yield to the evidence presented and the judge's

instructions." *Reynolds*, 23 M.J. at 294; *United States v. Davenport*, 17 M.J. 242 (C.M.A. 1984). The burden of establishing disqualification of a member is on the challenging party. R.C.M. 912(f)(3); *United States v. Bannworth*, 36 M.J. 265 (C.M.A. 1993). When reviewing the military judge's application of the test, we will reverse only for a clear abuse of discretion. *Bannworth*, 36 M.J. at 267; *United States v. White*, 36 M.J. 284 (C.M.A. 1993).

In reviewing for a clear abuse of discretion, some of the bench marks which an appellate court finds helpful are: whether the military judge merely accepted a perfunctory disclaimer of bias, *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985); or, whether a thorough inquiry was conducted after a member's response indicated inelastically, *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989); *United States v. Glenn*, 25 M.J. 474, (C.M.A. 1987); *United States v. Tucker*, 36 C.M.R. 474 (C.M.A. 1966); and, whether there is any indication from the record that the military judge failed to apply the liberal mandate when ruling on challenges for cause. *White*, 36 M.J. at 287.

The *voir dire* of Colonel B was extensive and thorough. Therefore, we look at his response as a whole, rather than isolating on one particular response. As the excerpt above reflects, the consistent theme running through Colonel B's response was, his anger or repulsiveness at the offenses notwithstanding, he would have to see and hear all of the facts and circumstances of the case. Further, in response to trial counsel, Colonel B stated he would not vote to impose a more severe punishment on an accused merely because of homosexuality. In reponse to other questions regarding the male-male homosexual overtones of the case, Colonel B stated he would have to hear the specifics of the impact on the individual victims.

The law does not require a court member to forget or disavow one's life experience or views, including one's religious views. What is required is that the member express *and* reflect a willingness to base the decision on punishment on the evidence of the case. *Davenport,* 17 M.J. at 244. Accordingly, our view of the record does not reveal a clear abuse of discretion by the military judge. He allowed and ensured a thorough *voir dire.* Although he did not articulate the liberal standard for challenges when he denied the challenge for cause of Colonel B, his granting of a challenge for cause of anothet member reflects a liberal standard.* In addition to finding no abuse of discretion, we find no substantial doubt as to the legality, fairness, and impartially of the trial.

II

Appellant next complains he received ineffective assistance of counsel. In addition to stating his trial defense counsel negligently failed to raise mental responsibility and his consumption of medication and alcohol during the time frame of the offenses, appellant states his counsel were remiss in not negotiating and securing a more favorable pretrial agreement. In individual affidavits, both counsel respond explaining the reasons for the varied tactical decisions made in appellant's case, with his concurrence.

The Sixth Amendment guarantees an accused the assistance of competent counsel in trials by court-martial. *Strickland v. Washington,* 466 U.S. 668 (1984); *United*

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* It certainly would have been helpful to this Court's review had the military judge articulated the standard to be applied and the specifics of Colonel B's *voir dire.* The fewer specifics provided by a military judge, the less the deference accorded to a ruling on challenge. *See United States v. Jobson,* 31 M.J. 117 (C.M.A. 1990).

States v. Scott, 24 M.J. 186 (C.M.A. 1987). Counsel is presumed competent, and the latitude accorded counsel in the many decisions which must be made while preparing for defending a case is, by necessity, wide. *Strickland v. Washington.* To prevail on a claim of ineffective representation, appellant must first demonstrate errors committed by his counsel, *and* demonstrate that the error or errors were prejudicial, that is, but for the errors of counsel the outcome of the trial would have been different. *United States v. Polk,* 32 M.J. 150 (C.M.A. 1991). However, tactical decisions made by counsel, if reasonable, are not second guessed on appeal, and they are viewed from counsel's perspective under the then prevailing circumstances. *United States v. Stephens,* 33 M.J. 79 (C.M.A. 1991).

After reviewing appellant's claims and trial defense counsel's response, we do not find ineffective representation. We resolve the factual issues against appellant, where applicable, and we find counsel's explanation of their tactical decisions credible and reasonable. We find appellant received representation by effective counsel at all stages of the proceeding. *United States v. Morgan,* 37 M.J. 407 (C.M.A. 1993). We find appellant has not carried his burden of demonstrating errors by his counsel.

III

In accordance with the plea agreement, appellant entered into a stipulation of fact describing the surrounding facts and circumstances of the offenses. At trial, however, trial defense counsel entered timely objection to the admissibility of certain portions of the stipulation. *See United States v. Glazier,* 26 M.J. 268 (C.M.A. 1988). Trial defense counsel interposed Mil. R. Evid. 404(b) to exclude the evidence of appellant using the threat of "White Magic" towards one of his victims. Appellant now claims

the military judge erred to his prejudice in overruling the objection. We disagree.

The stipulation clearly establishes that appellant used the white magic ruse not only to frighten one of his youthful victims not to report his crimes, but also to enable him to continue sodomizing the same victim. It was clearly an integral part of the facts and circumstances of the offenses, which made it *res gestae* or intrinsic evidence. *United States v. Metz,* 34 M.J. 349 (C.M.A. 1992). The military judge did not abuse his discretion in overruling the objection. *United States v. Spata,* 34 M.J. 286 (C.M.A. 1992); *United States v. Mukes,* 18 M.J. 358 (C.M.A. 1984).

Appellant also claims prejudice as a result of the military judge erroneously allowing inadmissible testimony of future dangerousness. The testimony in question was elicited by the Government from Doctor Rath, a recognized expert in the field, on appellant's rehabilitation potential. There was no objection to the testimony. Therefore, any issue relating thereto is waived, and we review for plain error. Mil. R. Evid. 103(a)(1), (d).

Even had there been an objection, the testimony was admissible. As mentioned, Doctor Rath's expertise was established; his testimony was based solely on the evidence admitted at trial; and, it was carefully restricted to his opinion on the varying degrees of difficulty of treating and rehabilitating appellant, given the admitted facts of the case. The testimony was well within the bounds of propriety, and appellant's mere labelling the testimony "future dangerousness" does not make it so. *United States v. Wingart,* 27 M.J. 128 (C.M.A. 1988); *cf. United States v. King,* 35 M.J. 337 (1992); *King,* 35 M.J. at 344 (Sullivan, C.J., Crawford, J., concurring and dissenting in part); *United States v. Williams,* 35 M.J. 812 (A.F.C.M.R. 1992). We find no error.

IV

Appellant also claims prejudice as a result of a claimed *ex parte* communication between a court member and a government witness. To support this belated claim, appellant submits an affidavit from LK. LK states that, on the evening of 16 January 1992, during a telephone conversation, she *was told* by CB, the mother of one of the victims, that a court member approached CB and asked if she was okay. Although LK was told the member's identity, she does not recall it in her 29 June 1992 affidavit. LK claims she reported the information to the trial counsel, Major B, via a three-way telephone call the evening of 20 January 1992, and Major B said not to mention it to anyone. Appellant's trial concluded on 17 January 1992. Major B submitted an affidavit disavowing any such information, and stating that, due to the location of the deliberation room, it was highly unlikely an improper communication would have occurred.

In view of the dates provided by LK, especially her claimed report to Major B 3 days after the trial, we accord minimal credibility to her affidavit, and we find it does not inspire confidence that a remand pursuant to *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), would be other than a waste of time and resources. *See United States v. Tripp,* ____ M.J. ____, ACM 30074 (A.F.C.M.R. 20 September 1993). We find no demonstration of error or prejudice.

V

Appellant's final assignment of error is that his sentence is inappropriately severe. We have given individualized consideration to appellant, including the nature and seriousness of the offenses and the character of appellant's service. We do not find the sentence, as approved, inap-

propriately severe. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The findings and sentence are correct in law and fact and, on the basis of the entire record, are hereby

AFFIRMED.

Senior Judge JAMES concurs.

Senior Judge RAICHLE did not participate.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Williams
NAOMI D. WILLIAMS
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0347/AF
CMR Dkt. No. 29744

UNITED STATES, APPELLEE

v.

NORMAN W. JOHNSON, JR., (229-23-2740), APPELLANT

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, it is by the Court this 22nd day of July, 1994,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,
/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (WATSON)
Appellate Government Counsel (INFELISE)

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0347/AF
CMR Dkt. No. 29744

UNITED STATES, APPELLEE

v.

NORMAN W. JOHNSON, JR., (229-23-2740), APPELLANT

On consideration of appellant's motion to submit documents, it is, by the Court, this 26th day of April, 1994,

ORDERED:

That said motion is hereby granted.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (WATSON)
Appellate Government Counsel (INFELISE)

APPENDIX C

IN THE UNITED STATES
COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0347/AF
CMR No. ACM 29744

UNITED STATES, APPELLEE

v.

AIRMAN (E-2) NORMAN W. JOHNSON, JR., FR 229-23-2740,
USAF, APPELLANT

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS

Pursuant to Rule 30 of United States Court of Military Appeals Rules of Practice and Procedure, appellant respectfully submits the following documents for this Honorable Court's consideration:

1. Staff Summary Sheet dated 30 November 1991 (Appendix A).
2. Letter titled "Ind to 15 AF/JA Ltr, Pretrial Advice," dated 30 November 1991 (Appendix B).
3. Letter from 22 ARW/CC to 15 AF/JA, titled "Nomination of General Court-Martial Members" (Appendix C).
4. Extract from Air Force Regulation 10-7 (Appendix D).

These documents are referenced in appellant's Supplement to Petition for Grant of Review previously filed with this Honorable Court. These documents are necessary for a full and proper resolution of the issues in this case.

/s/ Robert E. Watson
ROBERT E. WATSON, Capt, USAF
Appellate Defense Counsel
Air Force Legal Services Agency
United States Air Force
(202) 767-1562

For /s/ Robert E. Watson
LOUIS P. FONT
Font & Glazer
80 Boylston Street, Suite 910
Boston, MA 02116
(617) 482-6633

/s/ Frank J. Spinner
FRANK J. SPINNER, Lt Colonel, USAF
Acting Chief, Appellate Defense Division
Air Force Legal Services Agency
United States Air Force
(202) 767-1562

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and was delivered to Colonel Jeffery T. Infelise, Chief, Appellate Government Division on 6 Apr. 1994.

/s/ Frank J. Spinner
FRANK J. SPINNER, Lt Colonel, USAF
Acting Chief, Appellate Defense Division
Air Force Legal Services Agency
United States Air Force
(202) 767-1562

STAFF SUMMARY SHEET

	TO	ACTION	SIGNATURE (Surname), GRADE AND DATE		TO	ACTION	SIGNATURE (Surname), GRADE AND DATE
1	CC	Sign	[signature] 30 NOV	6			
2				7			
3				8			
4				9			
5				10			

SURNAME OF ACTION OFFICER AND GRADE	SYMBOL	PHONE	TYPIST'S INITIALS	SUSPENSE DATE
Major Richardson	JA	4247	gkr	

SUBJECT: Referral of Court-Martial Charges - U.S. v Johnson

DATE: 30 NOV 1991

SUMMARY

1. A1C Norman W. Johnson is charged with three specifications of sodomy on a child under the age of 16 years, three specifications of attempted anal and oral sodomy, and eight specifications of indecent acts or liberties with a child under the age of 16 years, respectively violations of Articles 125, 80, and 134, UCMJ. On 27 November 1991, the accused waived his right to a pretrial investigation under Article 32, U.C.M.J. The Special Court-Martial Convening Authority (SPCMCA) orally recommended that the charges and specifications be referred to a general court-martial. I concur. The SPCMCA has not submitted a list of officers from which you may select court members; however, we have a list of members submitted by the 22 AREFW/SJA from which you may select members. In addition to these officers, you may select any officer under your command or any officer made available to you by other commanders. You must select members who, in your opinion, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament.

RECOMMENDATION

2. That you refer the charges and specifications to a general court-martial. I further recommend that you select court members from the list submitted by the 22 AREFW/SJA. If you concur, please sign the Direction of the Convening Authority at Tab 1, make a selection of court members on the first indorsement, and sign that indorsement.

RICHARD F. ROTHENBURG, Colonel, USAF
Staff Judge Advocate

3 Tabs
1. SJA Advice w/1st Ind
2. Case file
3. 15 AF Forms 42 For Court Mbr Nominees

AF FORM SEP 84 1768 PREVIOUS EDITION WILL BE USED. GPO: 1990-240-987/8J440

APPENDIX B 15a

1st Ind to 15 AF/JA Ltr, Pretrial Advice, US v A1C Norman W. Johnson, Jr

15 AF/CC

30 NOV 1991

TO: 15 AF/JA

1. DIRECTION OF THE CONVENING AUTHORITY: All recommendations of the Staff Judge Advocate are approved.

2. The following individuals have been selected by me to serve as members of a general court-martial to hear the case of US v A1C Norman W. Johnson, Jr., FR229-23-2740. Selection was made by placing a mark in the space provided before each selectee:

(X) COL EVERETT G. BECKWITH, 22 CS (SAC), March AFB CA 92518-5000
(X) COL EDWIN SIERS, 15 AF (SAC), March AFB CA 92518-5000
(X) COL WILLIAM M. BERG, 15 AF (SAC), March AFB CA 92518-5000
(X) LT COL GLEN R. TANNER, 22 MSSQ (SAC), March AFB CA 92518-5000
(X) LT COL FORREST SPRESTER, 22 MED GP (SAC), March AFB CA 92518-5000
( ) MAJ ROBERT L. MILLER, JR., SWADS (TAC), March AFB CA 92518-5000
(X) MAJ GORDON G. BAILEY, 22 OPG (SAC), March AFB CA 92518-5000
(X) MAJ DAVID E. COOK, 22 TRANS (SAC), March AFB CA 92518-5000
(X) MAJ SIDNEY T. BLACK, 22 SPTG (SAC), March AFB CA 92518-5000
( ) MAJ JAMES A. GREER, 22 SUPS (SAC), March AFB CA 92518-5000
( ) MAJ DALLAS K. STEPHENS, 6 AREFS (SAC), March AFB CA 92518-5000
( ) CAPT KIMBERLY J. PARKER, 22 AREFW (SAC), March AFB CA 92518-5000
(X) CAPT STEPHEN M. BROWNING, 22 CS (SAC), March AFB CA 92518-5000
( ) 1ST LT PAUL NGUYEN, 22 TRANS (SAC), March AFB CA 92518-5000
( ) 1ST LT MARK A. GISI, 9 AREFS (SAC), March AFB CA 92518-5000

3. Prepare an order effecting the appointment of the above named selectees.

ROBERT D. BECKEL
Lieutenant General, USAF
Commander

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 22D AIR REFUELING WING (SAC)
MARCH AIR FORCE BASE, CALIFORNIA 92518-5000

APPENDIX C

16a

REPLY TO ATTN OF: CC

SUBJECT: Nomination of General Court-Martial Members - U.S. v JOHNSON

TO: 15AF/JA

The following individuals are submitted for nomination as members in the case of U.S. v JOHNSON.

Col Everett G. Beckwith, 22 CS, (SAC), 259-66-6179
Col Edwin Siers, 15 AF, (SAC), 456-72-5632
Col William M. Berg, 15 AF, (SAC), 556-54-6748
Lt Col Glen R. Tanner, 22 MSSG, (SAC), 560-74-6243
Lt Col Forrest Sprester, 22 MED GP, (SAC), 186-36-6270
Maj Robert L. Miller, Jr., SWADS, (TAC), 587-48-2973
Maj Gordon G. Bailey, 22 OPG, (SAC), 572-88-3318
Maj David E. Cook, 22 TRANS, (SAC), 046-50-8171
Maj Sidney T. Black, 22 SPTG, (SAC), 545-21-8490
Maj James A. Greer, 22 SUPS, (SAC), 497-50-0719
Maj Dallas K. Stephens, 8 AREFS, (SAC), 523-78-6482
Capt Kimberly J. Parker, 22 AREFW, (SAC), 378-84-5868
Capt Stephen M. Browning, 22 CS, (SAC), 528-98-1185
1Lt Paul Nguyen, 22 TRANS, (SAC), 556-50-1039
1Lt Mark A. Gisi, 8 AREFS, (SAC), 504-68-8298

WILLIAM P. COBB, Col, USAF
Commander

APPENDIX D

1-7. Close. The elements in the close depend on who authenticates the order and how it is done. All of the closes shown in figure 1-1 are permitted. Include an authority line in the close only when the commander's name is not used. On computer generated orders, a seal or signature is not required: however the word "official" must be placed above the signature element. The authorized authority lines are:

a. For Department of the Air Force—BY ORDER OF THE SECRETARY OF THE AIR FORCE.

b. For missions and commissions—FOR THE CHIEF.

c. For attaches—FOR THE AIR ATTACHE.

d. For the Air Force Academy—FOR THE SUPERINTENDENT.

e. For the Air Force components of unified and specified commands—FOR THE COMMANDER IN CHIEF.

f. For all other units—FOR THE COMMANDER or FOR THE COMMANDANT.

1-8. Numbering and Dating Administrative Orders. Each order must be dated. Number orders as follows:

a. All Orders:

(a) Number in order, starting with number one for each fiscal year.

(2) Cite, above the heading of the first order of a year, the number of the last order published the previous year, as shown in example 3, figure 1-2. When a series of orders is discontinued and consolidated with another series, include above the heading of the consolidated order: "SO (series and number), (organization), (date), was last SO published in (identify discontinued series). Effective this date, the (discontinued series) is consolidated

in (new series)." If no orders were published in a series during a preceding year (or years), include: "No orders were published in this series in (year (or years))."

(3) Continue to number in order when a unit is inactivated and is immediately followed by activation of another unit to perform the same mission. Cite the authority for redesignation, etc., above the heading of the first order published thereafter as shown in example 1, figure 1-2.

(4) Begin a new series when a unit is transferred, less personnel and equipment, to another base or command.

(5) Number orders of Reserve or National Guards units entering or leaving active duty according to AFR 12-50, volume 1, chapter 6.

b. Special Orders Published by Units Above Squadron Level:

(1) Number with a letter prefix to identify the series of orders. (Examples, A-1, A-2, G-1, G-2, etc.)

(2) Add a second letter prefix when you want to break out a series by type of action, preparing office, or unit. Assign the second letter in alphabetical order. For example, a headquarters might authorize a subordinate unit to publish in its name certain orders in the "T" series. To tell orders published by the subordinate unit from those published at headquarters, number the headquarters order TA-1, TA-2, etc., and those by the subordinate unit TB-1, TB-2, etc. This way may also be used within a headquarters, such as when a headquarters authorizes the Staff Judge Advocate to authenticate orders that appoint courts-martial.

c. Special Orders Published by Squadrons:

(1) Number "A" and "G" series orders with the proper letter prefix, as shown in b(1) above.

(2) Number "M" and "T" series with letter prefixes only if there are a large number of orders.

d. Reserve Orders:

(1) Number in a single series, for example (RO)-1.

(2) Add a letter prefix to break out these orders by type of action, preparing office, or unit. For example, a headquarters may authorize two subordinate units to publish certain reserve orders in its name. In this case, the headquarters orders would be numbered (RO)—A-1, A-2, etc.; those prepared by one unit (RO)—B-1, B-2, etc.; and those prepared by the other (RO)—C-1, C-2, etc.

★ **1-9. Citing Authority for Publication.** The authority for publishing an order need not be cited in the order, unless specifically required by directive. You must cite an authority in all orders that involve travel at government expense.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—381-632/87045